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No. 85-666

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC., and
THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

REPLY MEMORANDUM FOR PETITIONERS

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1. In its petition, The News showed that the opinion below conflicts with decisions of this Court and other courts of appeals on a fundamental question relating to the duty to bargain. Pet. 8-12. Those decisions establish that, as a matter of both statutory construction and due process, a company may not be penalized for failing to bargain with a labor union that had refused to deal with the company, especially where, as here, the National Labor Relations Board had designated a different company as the employer. In its response, the Board treats this issue solely as a matter of due process and argues that The News had been given adequate notice of its bargaining obligation to satisfy constitutional requirements. Br. in Opp. 12-14. That response largely misses the point and is wrong to boot.

The threshold issue in this case is statutory, not constitutional. This Court in *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), and the lower courts in subsequent cases have articulated rules that derive in the first instance from the bilateral nature of the statutory bargaining relationship. These rules are based on the recognition that Congress, when it subjected the employer and labor union to a common duty to bargain, intended that there could be no breach of that duty by one party when the other had given no indication of a desire or willingness to bargain. *Id.* at 297. The labor union in this case, the NMDU, not only failed to indicate a desire or willingness to bargain; it obtained from the Board a certification of a different company as the employer and it informed The News in writing that it would not meet with The News or deal with it as an employer.[1] In those circumstances, the statute did not require The News to consult with the NMDU before making operational changes.[2] There was, in short, no breach of the statutory duty to bargain. By casting the issue

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[1] The Board halfheartedly seeks to excuse the NMDU's refusal to deal with The News by speculating that the union may not have been aware of facts that the Board itself subsequently relied upon in finding The News to be the statutory employer. Br. in Opp. 13 n.8. Such speculation is beside the point. The determinative fact is that the union had denied the existence and precluded the formation of the bilateral relationship upon which the duty to bargain depends.

[2] The Board seeks to distinguish *Columbian Enameling* by claiming that the NMDU "had made clear its objections to the changes." Br. in Opp. 14 n.10. That claim is both irrelevant (for it does not alter the fact that the NMDU had refused to meet with The News) and factually incorrect. The portions of the record cited by the Board deal with T&T's efforts to negotiate route reductions and manpower cuts with the NMDU. *See* Pet. App. 90a-94a. This case, by contrast, grew out of The News' decision to hire certain workers of its own to insert advertising supplements. There is no suggestion in the record that these hirings would have necessitated reductions in the NMDU's routes or manpower levels.

solely in constitutional terms, the Board has sought to divert attention away from this threshold statutory issue.[3]

The constitutional issue arises only if it is determined that, notwithstanding *Columbian Enameling*, there can be a breach of the statutory duty to bargain in the circumstances of this case. Then a substantial question of due process is squarely presented: does a company have fair notice of its bargaining obligation when a labor union has refused to deal with it and has named a different company as the employer during certification proceedings? This question was resolved against the Board in *Alaska Roughnecks and Drillers Association v. NLRB*, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

The Board attempts to distinguish *Alaska Roughnecks* on the ground that the inconsistent certification in that case occurred "a few months" before the alleged failure to bargain, whereas the Board certified T&T's predecessor (rather than The News) twenty years ago. Br. in Opp. 14. But the longstanding nature of the NMDU's bargaining relationship with T&T and its predecessor simply compounds the unfairness of penalizing The News for failing to bargain. A company should not have to anticipate, at its peril, a sudden change in a decades-old bargaining relationship.[4]

The Board makes the unsupported assertion that "notice . . . had long existed" of The News' alleged bargain-

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[3] Indeed, the Board even states, quite incorrectly, that "The News does not dispute that, if it was the statutory employer, its actions were illegal." Br. in Opp. 9. That dispute lies at the heart of the question presented under *Columbian Enameling*.

[4] The Ninth Circuit's subsequent decision in *Sun-Maid Growers v. NLRB*, 618 F.2d 56 (9th Cir. 1980), does not cast doubt upon *Alaska Roughnecks*. In *Sun-Maid*, the court pointed out that the union's representation "was not the result of Board certification" and that the employer had willfully misled the union about its plans. 618 F.2d at 59. Those factors were absent in *Alaska Roughnecks*, as they are here.

ing obligation. Br. in Opp. 14. The facts are precisely otherwise. The NMDU, which had ample opportunity to ask the Board to designate The News as the employer, never did so; instead, it left intact its designation of a different company as the employer.[5] The NMDU then went out of its way to deny the existence of any bargaining relationship with The News. Pet. App. 205a-206a. There was no constitutionally adequate notice.

2. The News further showed that the decisions below and this Court's decision in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), establish conflicting standards of employment under the National Labor Relations Act ("NLRA") and the Federal Employers' Liability Act ("FELA"). Pet. 12-14. The Board denies this, Br. in Opp. 9-11, but its very response demonstrates that neither the Board nor the Third Circuit applied the *Kelley* test. Neither the Board nor the Third Circuit directed its attention to the "right to control . . . physical conduct." 419 U.S. at 325. The Board never cited *Kelley*; instead, it recited a laundry list of factors that had nothing to do with control of physical conduct. *See* Pet. 15 n.6. The court of appeals similarly failed to examine control of physical conduct, relying instead on a vague "right to control" test that did not distinguish between agents and employees. Thus, this case squarely presents the question whether the test for employment under the NLRA is the same as that prescribed by *Kelley* under the FELA or, instead, is the generalized test applied below and actually rejected by the majority in *Kelley*.

3. Even if the court of appeals correctly stated the test for employment under the NLRA, its decision vio-

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[5] The Board deals with this point only by saying that "it is irrelevant that the NMDU did not complain about its employer's actions until it had reason to." Br. in Opp. 14 n.10. That statement is a red herring. The designation of a new employer is not a "complaint." The question is one of notice—the NMDU could have given notice by requesting designation of The News, but it chose not to do so.

lated a basic rule of administrative law: instead of remanding to the Board for application of the correct test, the court erroneously assumed the responsibility for finding "facts" and determining in the first instance the existence of a master-servant relationship between The News and T&T. Pet. 14-16.[6] The Board now compounds this error by resting its description of the case not on its own findings but on the improper and erroneous "findings" of the court of appeals. *Compare, e.g.*, Br. in Opp. 3-4 *with* Pet. 16.

It is appropriate to recall the facts in detail:

> The News has no ownership interest in T & T. There are no common directors or officers. Bank accounts and books are kept and were kept separately and there is no movement of money indicating financial dependence or control other than the debt obligations incurred in the normal course of business arising out of the contract between the parties. No personnel of the News negotiates [*sic*] with the union, meet with union officials or are involved in labor relations.

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[6] The Board now contends that it applied the correct test itself when it stated that "T & T was little more than an administrative arm of [the News]; the Trombinas were managers employed by [The News] . . . ." Br. in Opp. 11 (quoting Pet. App. 29a). In fact, the Board's analysis was hopelessly confused:

> . . . T & T was not an independent contractor but the agent of [The News] . . . .
>
> The "right to control" test used to determine whether a person is an independent contractor is the same whether independent contractor status is urged as alternative to employee status or to agent status. The relationship between [The News] and T & T exhibited strongly most of the factors commonly associated with agency or employee status.

Pet. App. 29a-30a (citations omitted). It therefore is clear that the Board did not know and did not care whether T & T was merely a servant; the Board thought that its task was at an end when it found that T & T was an agent. But agency and employment are not synonymous concepts. *See Kelley*, 419 U.S. at 325.

> T & T hires, fires, and handles all personnel problems and grievances with a minor provisions [*sic*] already set forth in respect to the contract; recognizing that the trucks used by T & T are leased by the News, nevertheless T & T pays its own general liability insurance, Workers Compensation Insurance and other business insurance.
>
> T & T pays the drivers on its own checks and takes out withholding and remits that to the appropriate agency. T & T is responsible for the direction of its drivers and assignments of particular routes, although the routes are determined by the News.
>
> T & T has input into their determination. A letter from the union corporate counsel indicates that the union recognizes T & T and not the News as the party to its contract . . . .
>
> Regarding discussions between the News and T & T, the union counsel noted that, "Only if those discussions directly affect contractual obligations of the wholesaler"—T & T in this case—"would the union become involved, and in that event its discussions would be limited to the wholesaler."

Pet. App. 98a-99a.[7] In view of these facts, the administrative law judge refrained from finding T & T to be a mere servant. *Id.* at 106a. The Board did not reject his findings; it determined only that T & T was "the agent of [The News]." *Id.* at 29a. When the court of appeals then determined on its own that T & T actually was a servant of The News, it was departing, quite obviously and erroneously, from the rule announced in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).[8]

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[7] These facts were found in the first instance by the United States District Court for the District of New Jersey in separate litigation between the NMDU and The News and were set forth without disagreement by the administrative law judge in this case.

[8] The Board incorrectly suggests that section 10(e) of the NLRA, 29 U.S.C. § 160(e), prevents judicial review of the determination

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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that The News employed T&T's drivers, because The News "failed to object to the Board." Br. in Opp. 12 n.6. Section 10(e) simply states that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court." The administrative complaint alleged that The News employed the drivers of its "agent" T&T; The News denied that allegation in its answer; the parties litigated and fully briefed the issue before the administrative law judge; and they fully briefed it again before the Board.